PUBLIC PROSECUTOR

v.

SHAIK ANWAR ABDUL JALIL

HIGH COURT MALAYA, KUALA LUMPUR
WAN YAHYA J
[SELANGOR CRIMINAL TRIAL NO. CR 58-7-86]
7 DECEMBER 1989

EVIDENCE: *Admissibility of unrecorded admission which led to discovery of material facts - Section 27 of Evidence Act.*

The police had on information raided a house in which they found one Din Azman and Azman bin Katan and on Din Azman's information some cannabis were recovered in a room. When the accused was apprehended and brought to the house and interrogated he did not disclose information of any value to the police. However on seeing Din Azman, the accused made the statement about having kept some cannabis outside the house under a cherry tree and he had subsequently led his interrogator to the spot from which 2367 grammes of cannabis were recovered. The accused's Counsel objected to the admission of this piece of evidence which the prosecution argued was admissible under s. 27 of the Evidence Act.

Held:

[1] The recording of statements made which leads to the discovery of facts is to be recorded by following certain guidelines so as to prevent the likelihood of the police who, having already found the incriminating evidence was merely taking the accused there to implicate him with the element of knowledge.

[2] In this case from the evidence firstly the police appears to have prior knowledge of the hidden cannabis. Secondly, in obtaining the admission, the police had questioned both the arrested persons together which is unsafe especially if both interrogated persons have knowledge of the matter to be discovered. Unless it is noted down there is always the possibility of admission made by one to be confused with the other. Thirdly, when the accused was taken out of the house for the purpose of discovery, to the place where the drugs were recovered, it was wrong for the police to take along Din Azman who also had some knowledge of the hidden drugs. Proof of the statement made by the accused consisted only of oral admission made by him as recalled by PW5 and PW6 by sheer memory over events which transpired some four years ago. No written record was made.

[3] The memory in particular of PW6 appear to be vague. The evidence which came from PW5 and PW6 not only differed in material aspects but had also refrained from disclosing material facts relevant towards the fair determination of this issue. The statement is therefore inadmissible. No *prima facie* case has been made out.

[Accused acquitted and discharged.]

Case referred to:
Sum Kum Seng v. PP [1981] 2 MLJ 245

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B
Evidence Act 1950, s. 27

For the plaintiff - Mohamad Hanafiah bin Hj. Zakaria
For the defendant - Harpal Singh Grewal; M/s. A.J. Ariffin, Chong, Harpal (Amalgamated with)

JUDGMENT

Wan Yahya J:

It is unnecessary for me at this stage to relate the facts which are still fresh in our minds.

To substantiate its case for a charge under s. 39B of the Dangerous Drugs Act, the prosecution proffered only one proof; that in the course of his interrogation the accused admitted he had kept cannabis outside the house under a cherry tree and subsequently led his interrogator to that spot from which 2367 grammes of cannabis were recovered.

Accused's former Counsel objected to the admission of this piece of evidence but as his submission was purely based on law unsupported by adequate facts, I was unable to give full consideration to his objection. It did cross my mind at that stage that I should have determined this question by proceeding with a trial within a trial but as I had been intimated earlier during the opening address of the DPP, that this was the only evidence to be relied on by the prosecution, I decided that I would have arrived at the same outcome by initially accepting this evidence and considering its admissibility after hearing the entire evidence of the prosecution. In fairness to accused's former Counsel, I would reiterate what was said earlier that at the time when he made the objection the evidence of PW6 had not yet been received by this Court and therefore he was in no position to raise specifically the facts to which the law cited by him applied.

Further cross examination was conducted on PW5 and the cross examination of PW6 has also disclosed pertinent facts relevant to the point in issue.

The accused is new Counsel now, at the close of the prosecution case, raises once more the question of its admissibility. As I have mentioned before, this Court had initially allowed in the evidence with the reservation that the matter be reconsidered later after ascertaining the credibility of the witness involved in the alleged statement by the accused. Even if the reservation so made is no ground for reconsideration, the normal procedure in criminal trials demands that I should reassess the evidence of the prosecution as a whole to decide whether a *prima facie* case has been properly made out.

I shall therefore proceed to examine the only crucial evidence against the accused, i.e., his statement which the prosecution argued was admissible under s. 27 of the Evidence Act.

That evidence of PW5 in so far as it relates to this issue is that, on information, the police raided a house in which they found one Din Azman & Azman bin Katan. On Din Azman's information, the police party recovered some cannabis in a room. After interrogating Din Azman and Azman bin Katan, PW5 accompanied by some of his men and Azman bin Katan went to Kampung Baru and apprehended the accused in Dewan UMNO. Accused was brought to the house and on interrogation did not disclose information of any value to the police. So Din Azman who had been concealed in the room by the police was brought out to face the accused. It was at this juncture, according to PW5 & PW6 that accused made the statement about having kept some cannabis outside the house under a cherry tree. PW5 then instructed PW6 to take the accused outside the house and as they were walking out, the accused added that the cannabis belonged to one Izam Ali. The accused then walked with PW5, his two detectives and also Din Azman to a cherry tree from under which the accused, with both hands still handcuffed, pulled out the package containing 2367 grams of cannabis.

During cross examination PW5 admitted that he had been told about accused keeping drug outside the house by Din Azman and had mentioned this fact in his report.

On consideration of the prosecution case, I have noted that:

(i) proof of the statement made by accused consisted only of oral admission made by him as recalled by PW5 and PW6 by sheer memory over events which transpired some four years ago. Although the note book or diary was available, they made no use of it to record such important evidence.

Consequently their memory in particular PW6's appear to be vague so much so they could only recall the incriminating words used by the accused and nothing else.

In this respect, I refer to *Sarkar's Law of Evidence,* 13th Edn., p. 324:

> Statement made by accused to police officers which are or may be provable under s. 27 should be clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. No Judge should allow one word more to be deposed to by the police than is absolutely necessary to show how the fact discovered is connected with the accused. The accused made a statement to a police officer who got it repeated before panchayetdars, and an incomplete record was made of what the police officer thought would be admissible. It is the first statement to whomsoever made leading to discovery of fact that is admissible. The police, if they desire to record a statement must record it as given without mutilation leaving it to the Court to decide the evidence is admissible. Practice of the police recording wholesale confession running to several pages incorporating most incriminating statement against a co-accused and getting it attested by witness, condemned. The practice of police officers giving evidence of statements not made to them in the first instance was also condemned.

Although this is not an authority precluding the admission of unrecorded statement, the guidelines given is certainly relevant towards ensuring that was said by the accused, had led to the discovery of facts and to prevent the likelihood of the police, who, having already found the incriminating evidence, was merely taking the accused there to implicate him with the element of knowledge.

The same caution was expressed in *Sum Kum Seng v. PP* 2 MLJ 1981, p. 245:

> But before leaving this appeal we should express our clear view that while there is no strict necessary at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing and comes within the provisions of s. 27, both the decisions referred to and commonsense stress the desirability that the actual words be recorded somewhere.

(ii) the police appear to have prior knowledge of the hidden cannabis. Although PW5 denied this at the beginning of his cross examination he was compelled to admit this when confronted with the very report D9 which he had made before proceeding to arrest the accused. It transpired from the cross examination that he had acquired this information from Din Azman during the interrogation but he failed to disclose the nature of such information. By omitting to do so, I am left with the impression that he must have done so, as it was the natural and practical thing for him to question Din Azman on the whereabouts. An attempt was made during re-examination to negative this by getting PW5 to say that Din Azman did not tell him where the ganja was actually hidden but reading the particulars used in D9 the effect ...

I conclude that PW5 knew the place where the cannabis was hidden. In any event his natural instinct as trained policeman and his admitted interest in discovering the drug must have prompted him to determine the whereabout from Din Azman.

(iii) that in obtaining the admission under s. 27, PW5 had the unusual method of questioning both arrested persons together. Such practice although lawful is certainly unsafe especially so if both interrogated persons have knowledge of the matter to be discovered. Unless it is noted down somewhere, there is always the possibility of admission made by one to be confused with the other. The undesirability of this mode of interrogation appeared in *Sarkar's* 13th Edn., p. 322:

> In the case of joint production, where joint acts are sought to be proved, evidence should be given with some degree of particularity in order to enable the Court to draw the necessary information from the conduct of each one of the persons concerned. As long ago as 1884, strongly emphasised that the strictest precision should be enjoined on the witness and it is the right of each accused to have the witness required to depose to the exact words he alone used ... There may be difficulties in deciding in all cases which particular accused first made the statement leading to the discovery, but for the purpose of admissibility it is essential to establish the fact. Where there is evidence that the statement was made first by one person, it is admissible against him alone; when there is evidence that the statement was made by several persons simultaneously, then the information is admissible against all; unless such satisfactory and clear evidence of the one or the other is forthcoming on the point, the information would not be admissible against any one.

(iv) from the evidence, when the accused was taken out of the house for the purpose of the discovery, he was accompanied by PW5, PW6 Det. Zaki and Din Azman. Having acquired the information from accused it was wrong the police party to take along Din Azman who also had some knowledge of the hidden drugs to the place where it was recovered. No reason was given as to why he should be asked to go along with the accused. The fact when considered with the other aspects of the case raises a strong inference that Din Azman was also taken there for a purpose in connection with the recovery.

(v) Section 27 is related not only to the discovery of the incriminating object but more so to the statement by the accused implicating him with the object found. In cases where the entire proof is founded on the fact that the Court owes an extra duty to be vigilant and to approach the evidence so proffered with judicious circumspection. The evidence on this issue came from PW5 and PW6 who not only differed in material aspects but had also refrained from disclosing material facts relevant towards the fair determination of this issue.

I do wish to go at length into the evidence but I would only say at this juncture that the evidence before me was such that I am not prepared to accept that, a case not inherently incredible, had been made out in respect of the discovery. I shall therefore hold that the statement is inadmissible, disregard the relevant evidence recorded and consider the prosecution's case on the basis of such exclusion.

Looking at it as I do now, I find no *prima facie* case has been made out. I therefore acquit and discharge the accused without calling for his defence.

Also found at [1990] 1 CLJ 546